

Hon. Benjamin H. Settle
Submitted by: Petitioner/Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LINDA CAPO, an single woman,)	NO. C07-5685 BHS
)	
Petitioner/Plaintiff,)	
)	PETITIONER/PLAINTIFF
)	CAPO'S MEMORANDUM
v.)	IN SUPPORT OF HER
)	PETITION FOR REVIEW
PORT ANGELES SCHOOL DISTRICT)	
NO. 121; et al.,)	
)	
Defendants.)	
_____)	

NOW COMES Linda Capó, the petitioner/plaintiff, and in accordance with
RCW 28A.405.320, RCW 28A.405.330 and the court's Minute Order dated February 6,
2008, hereby submits this memorandum in support of her Petition for Review.

I. INTRODUCTION

. . . it would be manifestly unfair, besides illegal, to allow a discharge for
insufficient cause.

*Hoagland v. Mount Vernon School
District No. 320, Skagit County.*

PETITIONER/PLAINTIFF CAPO'S
MEMORANDUM IN SUPPORT OF
HER PETITION FOR REVIEW - 1
[Case No. C07-5685 BHS]

1
2 As will be described below in detail, the Port Angeles School District terminated
3 Linda Capo, a highly regarded and experienced high school special education teacher
4 after she came to the educational and emotional aide of a substantially at-risk but high
5 potential 15-year-old student. The original charges, including sexual misconduct, "sexual
6 grooming," "boundary invasions," and "abandonment of generally recognized
7 professional standards" were either abandoned by the District before the hearing or held
8 by the hearing officer to be unsubstantiated. The hearing officer sustained the discharge
9 for insubordination solely on the evidence of Ms. Capo's decision to resume tutoring the
10 student after an investigation into the District's allegations was completed.
11

12 The hearing officer "consider[ed] this to be a tragic case because Ms. Capo is
13 clearly an accomplished teacher and one with a big and expansive heart. Perhaps too big,
14 perhaps too expansive." Hearing Officer's Oral Ruling dated October 30, 2007. TR IV
15 17:11-14.¹ Accomplished teachers with big and expansive hearts, of which fortunately
16 there are many, are treasures in our society who must be encouraged and embraced for
17 their selfless efforts on behalf of our children. The hearing officer's gratuitous
18 observation is right on the mark; however, her conclusion that the School District had
19 sufficient cause to terminate Ms. Capo constitutes reversible error.
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24
25 ¹ Citations to the transcripts will reference page(s) and line(s) by number so that
26 Volume IV, page 17, lines 11-14 will appear as TR IV 17:11-14.

1 **II. RELIEF REQUESTED**

2 Linda Capo respectfully requests that the court reverse the decision of the hearing
3 officer because it was

- 4 (4) affected by error of law,
5 (5) clearly erroneous in view of the entire record submitted and by public
6 policy contained in the act of the legislature authorizing the decision or
7 order, and
8 (6) arbitrary.

9 RCW 28A.405.340. Alternatively, if the court believes that further proceedings are
10 warranted it may remand the case for further proceedings.

11 If the court reverses the decision of the hearing officer, Ms. Capo further requests
12 that it order the School District to immediately reinstate her to her former position as a
13 special education teacher at the Port Angeles High School, make her whole for her lost
14 wages and benefits, and, upon her post-order application, award her reasonable attorney's
15 fees for the preparation and trial of her appeal, together with her attorney's fees and
16 taxable costs in pursuing the Petition for Review.

17 Ms. Capo's requested relief is authorized by RCW 28A.405.340 and .350 and
18 RCW 49.48.030.

19 **III. FACTUAL BACKGROUND**

20 **A. A Chronological History Of The Dispute Between Ms. Capo And The School**
21 **District Leading To This Proceeding.**

22 1. On January 3, 2007, Ms. Capo was presented with a letter from the
23 principal of the Port Angeles High School, Scott Harker, advising her that "concerns have
24 been raised regarding your relationship with a Port Angeles High School student. I have
25

26 PETITIONER/PLAINTIFF CAPO'S
27 MEMORANDUM IN SUPPORT OF
HER PETITION FOR REVIEW - 3
[Case No. C07-5685 BHS]

1 scheduled a meeting with you to discuss this matter.” Capo Exh. 6.²

2 2. On January 4, 2007, Michelle Reid, assistant superintendent at the Port
3 Angeles School District, met with Ms. Capo and presented her with a letter telling her
4 that she was being placed “on non-disciplinary, administrative leave with pay pending the
5 outcome, of an investigation.” Capo Exh. 7. The notice went on to state:

6
7 *In order to preserve the integrity of the District’s investigation*, until
8 further notice you are directed not to contact or communicate in any way
9 with current or former students of the District, current or former staff of
the District, and witnesses to the events of this investigation, except
through this office.

10 *Id.* (Italics added.) Rather than “discuss this matter” as Mr. Harker had written in his
11 January 3 letter, Ms. Reid acknowledged that “not much” happened at the meeting.
12 Rather, Ms. Reid gave Ms. Capo the letter and:

13
14 directed Ms. Capo that she was being placed on administrative leave and
15 that she was to have – I don’t recall which exhibit that was – but
16 essentially she was to have no further contact with Jeremiah and his
family, current or former students, current or former staff of the District.

17 TR II 162:20-163:1.

18 3. The District retained Bellevue attorney Richard H. Kaiser to conduct an
19 investigation.³ He submitted a report dated April 3, 2007. TR II 197:14-198:16.⁴

20
21
22 ² Exhibits referenced in this Memorandum will be identified by the party offering
the exhibit and its number.

23 ³ Mr. Kaiser did not testify at the hearing.

24
25 ⁴ The report, District Exhibit 10, was admitted not for the truth of the matters
asserted in it but for the purpose of the District’s reliance on it. TR II 200:2-4.

1 4. A Notice of Pre-Determination Hearing dated April 12, 2007 was
2 delivered to Ms. Capo. District Exh. 12. Thereafter, she met with Port Angeles
3 Superintendent Gary Cohn on May 24, 2007 to respond to his questions regarding the
4 charges contained in the April 12 letter. District Exh. 13.⁵

5 5. On August 3, 2007 Superintendent Cohn issued a letter to Ms. Capo
6 asserting probable cause for her discharge. District Exh. 15.

7 6. Ms. Capo appealed the Notice of Probable Cause for Discharge by letter
8 from her attorney dated August 8, 2007 in which she made a request for a hearing
9 pursuant to RCW 28A.405.300. District Exh. 16. Superintendent Cohn acknowledged
10 timely receipt of the appeal in a letter to Ms. Capo dated August 24, 2007. Capo Exh. 12.

11 7. An evidentiary hearing was conducted by Justice (ret.) Faith Ireland
12 between October 23 and 25, 2007.

13 8. The District submitted its Proposed Findings of Fact, Conclusions of Law
14 and Order on or about October 25, 2007. Ms. Capo submitted her Proposed Findings of
15 Fact, Conclusions of Law and Order on or about October 29, 2007.⁶

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18
19 ⁵ Exhibit 13 was admitted over a hearsay objection as a prior statement of a party.
20 TR II 16:3-17:4. This constitutes an error of law. The document is not the statement of
21 Ms. Capo; rather, it is a transcript of what was purported to be a tape recording of the
22 May 24 Loudermill meeting. Likewise, the hearing officer erred by admitting the tape
23 prepared by Mr. Kaiser during the investigation. She overruled the objection for the
24 same reason. TR II 9:1-19. (Counsel for the District is quoted in the transcript as
offering District Exhibit 10B. He either misspoke or the transcript is in error. Clearly, he
was referring to Exhibit 10A, the transcript of the investigation.) This issue will be
discussed below.

25 ⁶ The parties' Proposed Findings, Conclusions and Order are included with the
26 materials the District filed with the Clerk's Office pursuant to the court's Order of
February 6, 2008.

1 9. The hearing officer issued her Oral Decision on October 30, 2007. TR IV
2 3:5-19:23. Her Findings of Fact, Conclusions of Law and Order dated November 6, 2007
3 is found at Exhibit 1 to the Complaint filed in this lawsuit.

4 10. Ms. Capo filed her Petition for Review on November 29, 2007 in
5 accordance with RCW 28A.405.320 in Clallam County Superior Court. The District
6 removed the lawsuit to federal court on or about December 12, 2007.

7
8 11. Ms. Capo moved for remand of her petition to state court or in the
9 alternative for expedited proceedings on January 11, 2008. The District joined in the
10 alternative request. The motion for expedited proceedings was granted and the court
11 subsequently issued a Minute Order on February 6, 2008 directing the filing of the record
12 and establishing a briefing schedule.

13
14 **B. Linda Capo's Background.**

15 Linda Capo has been a teacher since 1967. She holds valid teaching credentials
16 in both New York and Washington. She taught in New York from 1967 to 1996
17 excluding approximately 14 years from the late 1970s to 1993 when she gave birth to and
18 began raising four children. She was highly regarded as a teacher by colleagues and
19 administrators. In 1996 Ms. Capo moved from New York to Washington and worked as
20 a substitute teacher in Seattle area schools during the 1996-97 academic year. Finding
21 of Fact 3.

22
23 In 1997 Ms. Capo was hired as a full-time special education instructor by the Port
24 Angeles School District. Ms. Capo acted as a Chair of the Special Education Department
25 between about 1999 and 2003. Ms. Capo received annual evaluations which never
26

1 assessed her at a level below satisfactory and often praised her performance. Finding of
2 Fact 4.

3 Ms. Capo regularly extended herself to at-risk, underprivileged and special needs
4 children by providing them with tutoring and ministering to their health and welfare by
5 arranging for medical treatment, food, and clothing. She had a reputation for caring and
6 being concerned for students. There is no evidence that prior to this matter Ms. Capo was
7 ever accused or suspected of inappropriate behavior with students. Finding of Fact 5.

9 At all times relevant, Linda Capo was a permanent certificated employee of the
10 Port Angeles School District, teaching special education at Port Angeles High School.
11 Finding of Fact 1.

12 **C. The District's Charges Against Ms. Capo.**

13 On January 4, 2007 the District notified Ms. Capo that it had a concern that she
14 "may be engaged in an inappropriate relationship with a Port Angeles High School
15 student." District Exh. 8.

17 On April 12, 2007, in its Notice of Pre-Determination Hearing, District Exh. 12,
18 the District wrote:

19 **I. Allegations Against You**

20 In December 2006, certain allegations of misconduct and
21 unprofessional conduct on your part were brought to the District's
22 attention and you were placed on paid administrative leave. An
23 investigation was conducted which yielded preliminary findings that you
24 have engaged in boundary invasion behaviors with a student JH, including
25 twice sleeping in his bedroom and in his bed with JH present in the room
26 and no other adults present; spending the night in the same location with
27 JH on several occasions; giving inappropriate gifts to JH; going places
alone with him; taking a peculiar and unhealthy interest in him, riding in

1 an automobile alone with him and allowing him to drive your car without
 2 a license or learner's permit; inappropriately drafting a guardian
 3 complaint and medical authorization and other matters you were
 questioned about in your interviews with Rick Kaiser.

4 This misconduct, if true, could constitute unprofessional conduct
 5 on your part in violation of WAC 181-87-080, boundary invasion
 6 behavior conduct with a student, as well as WAC 181-87-060, disregard
 and abandonment of generally recognized professional standards.⁷

7 While the District refers to the violation of WAC 181-87-080 as "boundary
 8 invasion behavior conduct with a student," the Code provision to which it refers, WAC
 9 181-87-080, is entitled "Sexual Misconduct with Students." It is attached hereto in its
 10 entirety as Appendix A. It is significant that while the District continued to allude to this
 11 provision and refer to Ms. Capo's conduct as possible "sexual grooming" of the student,
 12 it did not claim a violation of this provision in the Notice of Probable Cause, strongly
 13 suggesting that it was well aware of the fact that there was no evidence that Ms. Capo was
 14 exploiting the student, sexually or otherwise, and that its directive that she have no
 15 contact with him was unnecessary to protect either the student or the District.⁸

16 In its letter of probable cause dated August 3, 2007, the District identified three
 17 charges against Ms. Capo:
 18
 19
 20
 21
 22

23 ⁷ The hearing officer determined that none of these charges were established by a
 24 preponderance of the evidence. TR IV 13:30-16:19; hearing officer's Conclusion of
 25 Law 1.

26 ⁸ Neither did the District contact state officials to report sexual misconduct as it is
 27 required to do if it reasonably believes such behavior is occurring.

1 First Charge - *Unprofessional Conduct - Boundary Invasion*
 2 Behaviors (WAC 181-87-060).⁹

3 Second Charge - *Unprofessional Conduct - Extreme Poor*
 4 Professional Judgment (WAC 187-81-060) [sic]¹⁰

5 Third Charge - *Unprofessional Conduct* - Serious Insubordination.

6 In its hearing brief the School District wrote "Ms. Capo is charged with
 7 unremediable misconduct. She is not being terminated for remedial job performance
 8 issues. . . . Ms. Capo's misconduct is unremediable as it materially and substantially
 9 affects her future performance as a teacher in the District and lacks any positive
 10 educational aspect or legitimate professional purpose." Port Angeles School District's
 11 Hearing Brief, at 1-2.¹¹

12 The hearing officer sustained only the third charge.

13 **D. The Hearing Officer's Findings.**

14 **1. The undisputed findings.**

15 Neither party has challenged a majority of the hearing officer's findings of fact.
 16 These undisputed findings include, in addition to those cited above describing Ms. Capo's
 17 background, the following:
 18
 19

20
 21 ⁹ This is where the District has dropped the allegation that Ms. Capo violated
 22 WAC 181-87-080 as discussed immediately above.

23 ¹⁰ While this erroneous citation has been corrected by an interlineation on Exhibit
 24 15 filed with the court, that interlineation was not part of the exhibit as proposed by the
 District at the hearing. The reference should be to WAC 181-87-060.

25 ¹¹ Attached as Exh. 1 to the Declaration of Jon Howard Rosen filed in this court
 26 on January 30, 2008 in support of Ms. Capo's Motion for Remand or Expedited
 Proceedings.

...

2. The student identified as LB¹² in this matter was a 15-year-old boy who was a student at Port Angeles High School during both the 2006-07 and 2007-08 school years.

...

6. Near the end of the 2005-06 school year, Ms. Capo requested referrals from her students for anyone they knew who had experience with meth addiction as she wanted to do an interview for a book she planned to write. Ms. Capo has written several books, including co-authoring a published textbook on grammar and composition.

7. L.B., a 15 year old sophomore, was introduced to Ms. Capo by one of her students in the spring of 2006. L.B. has been on probation for misdemeanor violations. He is a recovered methamphetamine user. He has alcohol problems. Prior to tutoring by Ms. Capo, he was failing virtually all of his subjects. He turned 16 years old in April 2007.

8. Some months after meeting L.B. and after getting permission from his guardian, Ms. Capo interviewed him away from school in the fall of 2006 more than a dozen times and audio taped his recollections of events in his life. Early in the project, as Ms. Capo heard the story of L.B.'s tumultuous upbringing, it was decided the project would be to tell his life story. Ms. Capo began to know L.B.'s family including his 83 year-old great grandmother Vera, (last name omitted for privacy) who was his guardian, her husband, who was dying of cancer and his two older brothers, Melvin and Jason. Melvin who was 18, lived in a 19 foot travel trailer with his girlfriend, who was 17. Jason, Melvin and L.B. were close siblings in spite of frequently being split up due to their being shuffled from relative to relative or living on the streets without housing.

9. The tapes produced and transcribed tell two stories. The first tape (and transcript called Fun Stuff) is a jocular romp through the young life of L.B. where he tries to portray as hilarious adventure his introduction to whiskey by his parent at age 4, first drug high at age 6, family violence, life and fights on the streets, living in the woods behind the projects or in a loft with a stripper pole. Ms. Capo can be heard laughing and encouraging him in his narrative. The tape (transcript called

¹² The student's actual initials are JH.

Overview) is a more sober and sensitive review of the same life with all of the violence, hurt, humiliation, love, raw tragedy and poignancy of L.B.'s life and family exposed. Ms. Capo is heard empathizing and drawing L.B. out.

10. Ms. Capo took a great interest in L.B. who she believed had considerable intelligence and potential. She described him as charismatic, funny and a pleasure to spend time with. Another teacher, Mr. Anderson,¹³ also characterized LB as charismatic. Although he was not her student, Ms. Capo arranged to tutor him in her fourth period preparation time even though he was assigned as an assistant in guidance counseling. She communicated with his teachers about his assignments and progress. When the assistant principal reassigned L.B. to the attendance office as an assistant, Ms. Capo wrote a letter of objection for his guardian, Vera to sign and for L.B. to present to the school. She also drafted a letter for his guardian to sign, authorizing L.B. to ride in her car and be at her home. It stated that Ms. Capo and L.B. were writing an autobiography and gives permission for her to tape record his account of his life. It also provides that Ms. Capo has the guardian's permission, in the event of an emergency, to take L.B. to a physician or hospital.

11. Ms. Capo and L.B. had a teacher-student relationship based on the fact that she was a teacher, she met him through her job as a teacher, and she interacted with him as a teacher at school in tutoring him during fourth period. As a student reporting to her 4th period, L.B. was under Ms. Capo's supervision, direction and control during that class. He

¹³ Kanyon Anderson testified with regard to why he considered the student to be "incredibly charismatic." He said, among other things, "He's critically evaluating the things that a lot of kids don't even think about. Like he critically evaluates policies at the high school, whether or not this is an appropriate policy or not. And most kids just blindly accept that's the rule and I do what I'm told. Jeremiah I think comes at things with a bit more of an adult perspective that he is willing to look at the world around him and decide I like this, I don't like this. And I think that's something a lot of people don't learn until they're older that it is okay to challenge things you don't like. It's refreshing to talk to a teenager who's thinking as much as Jeremiah is." TR III 85:19-86:7 He also testified that he attributed Ms. Capo's work with the student "as influencing his maturation and improvement over this last year." He went on to say, "And I told him that this is by far the best piece of writing I have ever seen you do, Jeremiah. And he said, oh, yeah, that's because Capo made me re-work the introduction five to six times. I spent a ton of time on this. Capo told me it didn't make any sense and that I had to redo it and she told it still didn't make any sense and I had to redo it again. So he was smiling when he was saying about that." TR III 86:22-87:10.

1 was therefore by law a student of Ms. Capo (WAC 181-87-040(1).) In
 2 addition, the fact that Ms. Capo was a teacher in the District and the fact
 3 that L.B. was a student in the District created a teacher-student
 relationship between them. (WAC 181-87-040(2).)

4 ...

5 22. At first Ms. Capo abided by the stay away order. However,
 6 somewhere in the spring, before April 12, Ms. Capo began violating the
 7 order by having L.B. at her house after school, about four afternoons a
 8 week for tutoring. He was failing all his classes and, according to his
 9 testimony, had been told by his probation officer that he would spend the
 10 summer in detention if he did not pass. Ms. Capo was given a further
 stay-away directives on February 12 and April 12, 2007. Ms. Capo
 acknowledges that she knew that she was in violation of the District's stay
 away orders and that they had not been eliminated.

11 ...

12 25. L.B. testified that Ms. Capo has helped him greatly. He
 13 brought his grades up to passing before year end. He is currently getting
 14 B's in school. He said this was some pride and also gave an example of
 15 how she has improved his judgment and ethics. He is back living with his
 16 remarkable guardian and great-grandmother, Vera. Vera also testified as
 to how much she believes that Ms. Capo has helped L.B. Although she
 is 83 and lost her husband last winter, Vera presented as competent, sharp,
 loving, and capable.

17 ...

18 27. As to the first charge concerning "Boundary Invasions"
 19 there is no evidence that the District had any policy, rule, guideline,
 20 standards or training about "boundary invasion" for its teachers. Michele
 21 Reid testified that no policies about teachers staying at student's home or
 vice verse should be necessary. It's just "common sense."

22 ...

23 29. ...

24 The absence of information defining "boundary invasion" and
 25 setting standards deprives District employees of advance knowledge of
 26 what they are prohibited from doing. In the absence of policies,

1 guidelines, or training on such boundary invasion, the District has failed
 2 to prove by a preponderance of the evidence that the behavior here
 3 constitutes misconduct sufficient for termination without remediation.

4 ...

5 31. As to Charge Two (—poor judgment, conduct “in flagrant
 6 disregard or clear abandonment of generally recognized professional
 7 standards,”) it is the lack of evidence about what are the generally
 8 recognized professional standards where the District’s proof fails. If the
 9 hearing officer is simply to exercise his or her judgment, the outcome is
 10 subject to mere personal opinion and not professional standards. The
 11 language of Charge Two “using her relationship with L.B. to meet her
 12 own inner needs” has not been proved by a preponderance of the
 13 evidence. The evidence is as susceptible to finding Ms. Capo’s actions
 14 those of a mentor or surrogate parent as of meeting her own inner needs.
 15 The District has not proved an improper motive. That part of Charge Two
 16 concerning violation of the stay-away order is subsumed in Charge Three
 17 which has been found for the District.¹⁴

18 **2. Ms. Capo has challenged the following Findings:**

19 ...

20 21. Given the information the District had received, the
 21 District was justifiably concerned about Ms. Capo’s relationship with L.B.
 22 and it was reasonable for the District to place Ms. Capo on administrative
 23 leave on January 4, 2007 to investigate that relationship. Ms. Capo was
 24 given oral and written directives on that day to remain away from L.B.
 25 among others.

26 ...

27 23. The District’s stay-away orders concerning L.B. were
 made in good faith and it was reasonable pending this hearing which was
 held on October 23-25, 2007. Even though the investigation was basically
 concluded by Aug. 3, the stay-away order was not eliminated. Given that
 L.B. was likely to be a witness to the case, it was reasonable that the
 orders continue. In fact, Ms. Capo acknowledges that she showed the
 probable cause letter to L.B. who researched the cited cases and formed

28 ¹⁴ There are other undisputed findings as well. However, given the hearing
 29 officer’s Findings 27 and 31 and Conclusion 1, they are not material to this petition.

1 opinions about the District's case.

2 24. The stay away directives were lawful. Ms. Capo as an
3 employee of the District was therefore required to obey those directives.

4 . . .

5 26. Despite her efforts to help L.B. and the apparent benefit,
6 I find that Ms. Capo's decision to disregard the stay-away orders
7 constitutes serious insubordination and justifies the District terminating
8 her employment. Ms. Capo made the decision with full knowledge of the
9 consequences as she testified in this hearing "as a matter of conscience."
10 In the May 24, 2007 interview with Dr. Cohn, Ms. Capo said "...I right off
11 the bat when I met him determined I would show him steadfastness,
12 because I could hear how person after person in his family betrayed
13 him."¹⁵

14 ¹⁵ Ms. Capo also testified:

15 Q. When you started working with Jeremiah and seeing him
16 on a regular basis I think you said in about April of this year.

17 A. Yes.

18 Q. Now what was your reason or reasons for reinstituting \
19 contact with him?

20 A. I was convinced that I was a good role model for him. I
21 knew I brought stability to his life and I strongly suspected that
22 his grades were not in very good shape. It was a matter of
23 conscience. I understood the District's directive and thought it
24 was wrong to adhere to it.

25 Q. Had you ever had any discussions with Ms. Reid about
26 the length of the restriction?

27 A. I called her a week or two after I was first placed on leave
and asked her how much longer she thought it would take and
she thought it would be over in a week or two.

I also on the day that I went in to pick up the report from
Mr. Kaiser, Mrs. Reid told me the gag order would be over and
she said Dr. Cohn had finished his investigation.

Q. Now as far as was there any further investigation to your
knowledge after Mr. Kaiser submitted his report?

A. Not to my knowledge.

TR II 129:5-130:7

...

29. ...

The testimony of Mr. Kahn was admissible to show the reasonableness of the District's actions in placing Ms. Capo on administrative leave and in issuing and continuing its stay away order in regard to L.B. However, the court finds the testimony inadmissible for purposes of determining whether Ms. Capo has committed misconduct in charges two and three. *State v. Braham*, 67 Wn. App. 930, 937-38, 841 P.2d 785 (1992) (use of general expert testimony concerning grooming evidence impermissibly implied defendant's guilt and was generally without value.) Although this is not a criminal case, and not a jury trial *State v. Braham* should apply here as well.

...

30. Ms. Capo argues that the term "boundary invasion" is unconstitutionally vague. In view of the foregoing finding, this issue need not be addressed.¹⁶

Ms. Capo will argue below the bases for her claim that there is no substantial evidence to support the hearing officer's Findings that the stay away order was reasonable or initially made in good faith. She will also argue that there was no substantial basis to maintain the order, even if it was originally justified, after attorney Kaiser's investigation was concluded, a point up to which Ms. Capo had fully complied with the order despite the pleas from and detriment to the at-risk student.¹⁷ Lastly, even if the order banning Ms. Capo from contact with the student was reasonable, there is a lack of evidence that substantial cause existed to terminate Ms. Capo for violating the directive.

¹⁶ Since the District has not challenged any of the hearing officer's Findings and Conclusions with regard to Charges One and Two, whether the hearing officer erred with regard to Finding 30 is moot.

¹⁷ See TR III 55:22-57:25.

As will be shown below, some of the disputed Findings of Fact are in reality conclusions of law (see Findings 24, 26 and the third paragraph of 29).

E. Facts The District Knew Or Could Reasonably Infer On January 4, 2007, The Date It Placed Ms. Capo On Administrative Leave And Directed Her To Have No Contact With Present Or Former Port Angeles School District Students, Families Or Present And Former Faculty.

The record reveals that on January 4, 2007 the District's administrators had no reasonable basis to believe that there was any legitimate justification to deprive Ms. Capo of contact with what was virtually the entire Port Angeles community. The testimony of what the District's witnesses know or could reasonably infer as of January 4, 2007 is instructive.

Michelle Reid

Q. Thank you. Did you have occasion to become involved in an investigation into Ms. Linda Capo?

A. I did.

Q. And how were you brought into that?

A. Dr. Cohn requested that I begin – actually, I believe the term he used was placed. He placed me as the point person on the situation in late December of 2006.

Q. What is the first thing that you did – did you then conduct an investigation or begin an investigation?

A. I did.

Q. And what is the first thing that you did?

A. The first conversation I had related or first piece of investigation, if you will, was I met with Jeremiah in Scott Harker's office on December 21st.

Q. What occurred during that meeting?

A. There were actually several reasons for the meeting, several of which were not initiated by me. It was my understanding that Jeremiah had a concern about his schedule and also about the supervisory assignment, which administrative staff members at the high school who oversee any disciplinary activities connected to his behavior. And my purpose ostensibly in meeting with Jeremiah was to determine if there had been any activity between

him and Linda Capo that would lead me to believe that there was something untoward going on in the relationship.

...

Q. What was your purpose in the meeting?

A. My purpose?

Q. Your purpose.

A. To question – well, to meet Jeremiah Hilt and to question him with regard to his relationship with Linda Capo.

Q. And did you do that?

A. Yes.

Q. What did he tell you?

...

A. Would you repeat the question?

Q. Well, I'm going to ask you what you were told but do you need your notes?

A. I'm looking for that while I was – I found them. So I'm responding to what I was told by Jeremiah in that meeting?

Q. Correct.

A. Okay.

...

Q. What you were told by Jeremiah on 12-21-06?

...

A. And so Jeremiah indicated that he had been assigned as a guidance TA. The meeting started with the conversation around the TA issue that he'd been a guidance office TA, there hadn't been much work in the guidance office so he had been doing some tutoring in fourth period with Ms. Capo. *That he believed he was bringing his grades up and that was a situation that he rather preferred to being an office aide.* I asked about whether or not Jeremiah had been receiving rides either to or from school. *Jeremiah affirmed that indeed he's been given rides home by Ms. Capo.* I asked about a book that supposedly was being written. *Jeremiah responded that he was being interviewed for purposes of writing a book with Ms. Capo on the effects of meth addiction. He indicated they'd met 15 or more times to work on this paper or story. That she had worked in his great-grandmother's home. That she would bring a laptop and they would work there often. I asked if he had worked at Ms. Capo's house and he had indicated that yes, he had. That he'd also helped her dig up a*

TR II 155:9-163:1 (italics added).

...

Q. You met with Jeremiah on the 21st of December, correct?

A. That's correct.

Q. And you met with him again on the 24th or so – 26th of January?

A. That's correct.

Q. Had you met with him at any time prior between those two dates?

A. Not to my knowledge. Not that I recollect.¹⁹

TR II 182:22-183:5.

Gary Cohn

Q. Dr. Cohn, at some point did it come to your attention an issue concerning Linda Capo and a relationship with a student, Jeremiah?

A. yes.

Q. And how did you become aware of this?

A. *I believe the first time the issue arose for me was when Linda spoke with Mark Jacobson about transporting the student in her vehicle. That's my recollection.*

Q. What actions did you take after this information?

A. It wasn't that I specifically took individual action. I know that I listened to Mark's concern over what he's heard. I know that I had been a bit concerned about the circumstances as I understood them at the time and asked that he be clear about his instructions and that he contact risk management to notify them about what we'd learned and ask their advice with respect to a response. And it was my understanding that he did that.

Q. Did you direct that an investigation be performed?

A. I do not recall directing an investigation be performed at that time with that information, no.²⁰

TR II 195:24-196:22 (italics added).

Mark Jacobson

¹⁹ This testimony was on cross-examination by Ms. Capo's counsel.

²⁰ Testimony of Dr. Cohn during cross-examination by Ms. Capo's counsel.

1 Q. On or about December 8th, 2006 did you have a meeting with
2 Linda Capo?

3 A. Yes, I did.

4 Q. How did that come about?

5 A. If I recall, she called the office and wanted to know if I'd be
6 available that afternoon. She had a risk management question for
7 me.

8 Q. What is risk management?

9 A. Risk management has to do with insurance procedures or risks that
10 involve school districts and personnel.

11 Q. Did you meet with her?

12 A. Yes, I did.

13 Q. And did she have any documents with her?

14 A. Not that I recall.

15 Q. Could you turn to District Exhibits – turn to tab 10 and then you'll
16 find letters behind those tabs and 10E; have you seen that letter
17 before?

18 A. I don't know if I have seen the letter, but she referenced she could
19 get a letter or the grandparents were willing to write a letter to
20 allow their grandson to ride with her. And matter of fact, I did not
21 see the letter. She said she'd provide me a copy if I wanted one or
22 could get a letter from them.

23 Q. Could you turn – well, did she bring any letters at all with her into
24 that meeting?

25 A. Not that I recall.

26 Q. What conversation did you have with her?

27 A. *She asked me or indicated that she was going to be working with
the student on a book and said she was looking at driving him and
back and forth to his grandparents' house and wanted to know if
that would be an issue. What I stated [sic] with her is that I
would never put a child in my personal car, nor would I be alone
with a student unless the grandparents were there in the home. I
have been telling staff for the – since I was superintendent and the
rules changed back in 1992 or '93 on whether you could transport
a student. You used to be able to do that with a special license or
training. Since then we always don't put them in a car unless it is
a matter of life and death.*

Q. An emergency?

A. An emergency situation where they'd be hospitalized if you didn't
take action.

Q. Did you have any other conversation with Ms. Capo at that time?

A. *She had mentioned going to the house and working with a student.*

And I had emphasized to her at that point in time that I wouldn't ever put myself in a situation where I put my profession at question or my professionalism in question. And then there was a little bit of conversation about whether it was after school hours or during school hours if that made a difference.

Q. Do you recall what that conversation was?

A. Yes, I shared with her I wouldn't put myself in a situation that would cause any question whatsoever. I said the schools aren't in control of you 24 hours a day, but you're still viewed as a certificated staff member and expectations are that that's how you behave.²¹

TR II 149:11-151:21 (italics added).

Maryanne Unger

Q. In December 2006 did anything occur regarding a particular student of Ms. Capo?

A. *My recollection is going into Ms. Capo's class and noticing that a student was in the classroom I didn't expect to be there at that time.*

Q. *The student, I'm going to call him J. The student, had you been aware that he had been in Ms. Capo's classroom prior to this time?*

A. *I did not.*

Q. You knew this student?

A. I did.

Q. Do you know where that student was regularly assigned for fourth period?

A. He was regularly in the schedule in the computer he was scheduled to be an office TA for the guidance office.

Q. So when you saw this student in Ms. Capo's classroom do you recall if she was present at that time?

A. I don't believe she was there at that time.

Q. And so what did you do at that time?

A. Noticing that he was there and knowing that he was an assistant in the guidance office I asked why he was there. And also asked if he might be interested in being an assistant in the attendance office because our office did not have a helper during that period.

Q. So you were shorthanded?

A. We were shorthanded in the attendance office.

²¹ Direct examination by the District's counsel.

1 Q. So what occurred next?

2 A. He said that that seemed okay to him at that time. And so I
3 suggested that we check with his counselor, Ms. Jacobs, to see if
4 that was, you know, if it was reasonable. And if it was just a
5 temporary thing, if he wasn't needed in the guidance office or if
6 they really didn't need another office TA.

7 ...

8 Q. So what action did you take with respect to this student, J?

9 A. I don't recall if the student went with me to the guidance office or
10 I went alone to discover if it was possible for him to change his
11 assistantship from the guidance office to the attendance office.
12 But that was my next step to check and see if that was a
13 possibility.

14 Q. What was the ultimate outcome?

15 A. He was reassigned to the attendance office.

16 Q. What was your motive in reassigning him? Did you have any
17 motive of retribution against Ms. Capo in doing that?

18 A. I did not.

19 Q. What was your reason for having him assigned to the attendance
20 office?

21 A. We did not have a student that would carry notes from classroom
22 to classroom during that period.²²

23 TR II 144:6-146:19 (italics added).

24 To summarize the testimony, as of January 4, 2007, the District was aware that
25 Ms. Capo had been:

- 26 • tutoring an at-risk student;
- 27 • interviewing him with regard to a book she was writing;
- advocating that he be assigned to her classroom for tutoring during her
fourth period planning class;
- seeking permission, along with his great-grandmother, to transport the
student in her car before and after school hours;

²² Direct examination by the District's counsel.

1 It is abundantly clear that prior to placing Ms. Capo on administrative leave and
 2 gagging her there is no evidence that any school district representative spoke with
 3 Ms. Capo or Vera Hilt, Jeremiah's great-grandmother and custodial relative, or spoke
 4 with or received any complaints from any family member or community source. Neither,
 5 importantly, is there evidence that even suggests that District administrators knew or had
 6 reasonable belief to suspect on or before January 4, 2007 that Ms. Capo had slept in the
 7 student's bedroom or the student's brother's trailer, allowed him and his brother and/or
 8 friends sleep at her home, that she had given him Christmas gifts, or that she had allowed
 9 him to drive her car as the hearing officer later concluded to be neither unprofessional
 10 conduct, boundary invasion behaviors, or extreme poor professional judgment.

11
 12 **F. The District Has Relied On Hoagland Factors To Support Its Termination**
 13 **Of Ms. Capo For Insubordination At Every Step In The Process.**

14 In the probable cause letter of August 3 Dr. Cohn states:

15 *Each of the charges against you arises out of instances of your*
 16 *misconduct, not job performance.* As such, each of the charges relates to
 17 *unremediable conduct as that term is defined by law. . . .*

18 Certified employees may be disciplined for conduct which occurs away
 19 from school when there is sufficient connection between the misconduct
 20 and service as a public school teacher. (*Hoagland v. Mount Vernon*
School District . . . ; see also WAC 181-86-080)

21 District Exh. 15 at 6 (italics added). This language was repeated in the District's hearing
 22 brief, as indicated *supra*, at page 7. Further on in the brief while "applying" the
 23 *Hoagland* factors in the context of the insubordination charge it wrote:

- 24 **a. (2) Likelihood of Detriment:** . . . Ms. Capo can no longer be trusted
 25 around students. She not only does not understand what
 26 appropriate boundaries are, she willfully defies the oral and

1 should not be teaching.

2 *Id.* at 6-7.

3 Then, in its motion to amend its probable cause letter solely to include “additional
4 times that Ms. Capo had violated these directives” the District argued that *Hoagland* was
5 the case which “sets forth factors to consider whether a teacher’s conduct away from
6 school is sufficiently objectionable that the school district employing the teacher may
7 discharge the teacher.” District’s Motion to Amend, *supra*, at 2-3.

9 Finally, in his closing argument, counsel for the District stated: “The court, the
10 arbitrator [sic] has to be guided by the *Hoagland* factors in this case. TR III 96:9-10.

11 **IV. QUESTIONS PRESENTED**

12 A. Are the hearing officer’s Findings of Fact 21, 23, 24, 26 and 29 actually
13 either conclusions of law or mixed questions of fact and law that should be reviewed *de*
14 *novo*? In the alternative, if they are findings of fact, based on the disputed Findings and
15 the substantial evidence in the record, are they clearly erroneous?

17 B. Did the hearing officer err as a matter of law by concluding that
18 “Ms. Capo’s actions in resuming frequent contact with L.B. [sic] while under a
19 reasonable stay away order constitute serious, substantial, ongoing insubordination which
20 is not remediable? Conclusion of Law 2.

22 C. Did the hearing officer err as a matter of law by refusing to apply the
23 *Hoagland* factors in determining whether the School District had sufficient cause to
24 terminate Ms. Capo for insubordination? Conclusion of Law 3.

25 D. Did the hearing officer err as a matter of law concluding that the School
26